DATO' SERI TIONG KING SING

v.

DATUK WILLIAM LAU KUNG HUI & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-23-2001]
13 JUNE 2003

CIVIL PROCEDURE: *Striking out - Grounds for - Application under Order 18 r. 19 Rules of the High Court 1980 - Necessity of courts to not only look at pleadings but also affidavits and documents filed*

CIVIL PROCEDURE: *Action - Disposal of action without trial - Whether seriously disputed questions arose between parties - Whether could only be decided at trial - Oral guarantee - Whether enforceable in Sarawak - Whether such question suitable to be decided on a summary application*

This was an appeal by the appellant/plaintiff against the decision of the learned Sessions Court judge who struck out the plaintiff's claim against the respondent/1st defendant on the grounds that it was frivolous, vexatious, scandalous and/or it was an abuse of the process of court. The plaintiff had claimed for the payment of RM50,000 which he lent to the 2nd defendant, allegedly on the strength of an oral guarantee given to him by the 1st defendant. The 1st defendant rebutted the plaintiff's claim, submitting that there was no oral guarantee given to the plaintiff as alleged, but even if there was one, then it was unenforceable by virtue of s. 4 of the Statute of Frauds 1677, which the 1st defendant contended was still applicable in Sarawak.

Held:

[1] The principles upon which the court acts in exercising its powers under any of the limbs of O. 18 r. 19(1) Rules of the High Court 1980, which is equivalent to O. 14 r. 21(1) Subordinate Courts Rules 1980, is that the court will only strike out a claim where it is obviously unsustainable on the face of it. When a party applies to strike out his opponent's pleadings under O. 18 r. 19 on a ground other than ground 1(a) of the rule, the court is not only confined to look at the pleadings but also the affidavits and documents that have been filed by the parties. (p 7 a-c)

[2] Considering the evidence produced, a serious dispute of fact had arisen on whether an oral guarantee was given at all. Thus, the plaintiff's claim ought not to be described as frivolous, vexatious, scandalous or one made in abuse of the process of court. The seriously disputed question which arose between the parties on this point could only be decided at a trial and not on the basis of disputed facts stated in the affidavits on the hearing of a summary application. (pp 4 c & 8 c-g)

[3] It was inappropriate for the learned Sessions Court judge to have proceeded to hear the first defendant's application without first reaching a decision on whether or not an oral guarantee had been given. The disputed question of whether the first defendant had given an oral guarantee or not could only be decided at a trial. (p 9 b-c & h)

[4] The issue whether an oral guarantee is enforceable in Sarawak gave rise to a serious question. The court would have had to decide as a matter of law whether s. 4 of the Statute of Frauds 1766 would still be applicable in Sarawak or whether the law on guarantees is now governed by the provisions of the Contracts Act 1950. It would not have been suitable to decide this difficult question of law on a summary application. Therefore, the learned Session Court judge did not adopt the correct approach in deciding the 1st defendant's application. (p 10 d-e)

[Appealed allowed.]

Case(s) referred to:
Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 SC ***(refd)***
Chew Siang Jin v. Lau Chee Chung & Ors [2001] 1 CLJ 822 HC ***(refd)***
Lee Phek Choo v. Ang Guan Yau & Anor [1975] 2 MLJ 146 ***(refd)***
Tay Guan Hoe v. Chin Huat Hin Co [1987] 2 MLJ 704 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 1(2), 3(1)(c), (3)(ii), 5(2)
Contracts Act 1950, ss. 1(2), 79
Interpretation Acts 1948 and 1967, s. 3
Rules of the High Court 1980, O. 18 r. 19(1)
Subordinate Courts Rules 1980, O. 14 r. 21(1)(a), (b), (d), O. 15(1)

Law Reform (Enforcement of Contracts) Act 1954 [UK], ss. 3(1)(c), (3)(ii)
Statute of Frauds 1766 [UK], s. 4

Other source(s) referred to:
Malaysian High Court Practice, 2001 Desk Edn, pp 612, 613

For the appellant - Henry Ling; M/s Ling & Wong
For the respondent - Chew Peng Hui; M/s Battenberg & Talma

Reported by Raja Vishnu Sivarajah

JUDGMENT

Clement Skinner J:

This is the hearing of an appeal brought by the appellant who was the plaintiff in the court below, against the decision of the learned Sessions Court Judge who on 26 November 2001, struck out the plaintiff's claim against the respondent who was the first defendant in the court below, on the grounds that it was frivolous, vexatious, scandalous and or it was an abuse of the process of court. For convenience I shall continue to refer to the appellant as the plaintiff and to the respondent as the first defendant.

The plaintiff's claim against the first defendant is for payment of the sum of RM50,000 which he lent to the second defendant, allegedly on the strength of an oral guarantee given to him by the first defendant to repay the said sum if the second defendant did not do so within two months of being given the loan.

The first defendant filed a defence to the plaintiff's claim. In essence, his defence is that there was no oral guarantee given to the plaintiff as alleged, but that if there was one given then it is unenforceable by virtue of s. 4 of the Statute of Frauds 1677, which the first defendant contends is still applicable in Sarawak. That section (as amended) states that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised".

The first defendant filed his application to strike out the plaintiff's claim under O. 14 r. 21(1)(a), (b), (d) Rules of the Subordinate Courts on the grounds that:

(1) it disclosed no reasonable cause of action and or

(2) it is frivolous, vexatious, and scandalous and or

(3) it is an abuse of the process of the court.

When the first defendant's application came up for hearing, he abandoned his first ground under O. 14 r. 21(1)(a) and proceeded to argue the application relying only on his second and third grounds ie, that plaintiff's claim ought to be struck out as it was frivolous, vexatious, scandalous and an abuse of the

process of court. His arguments found favor with the learned Sessions Court Judge who found that as the Statute of Frauds was still applicable in Sarawak, the plaintiff's claim, being based on an oral guarantee, was unenforceable as there was no memorandum or note thereof in writing and hence must be struck out.

The plaintiff complains that the learned Session Court Judge was wrong in striking out his claim because in having withdrawn his first ground of application, the first defendant must be taken as conceding that the plaintiff's action did disclose a reasonable cause of action against him. Proceeding on that basis, the plaintiff says that nothing had been disclosed in the affidavits or documents that would move the court to strike out the plaintiff's action as being either frivolous, vexatious, scandalous and or an abuse of the process of the court. According to the plaintiff, this was particularly so as he had in his affidavit of 5 February 2001, produced two document 'TKS1' and TKS2', evidencing the RM50,000 advanced to the second defendant, of which 'TKS1' was a letter written by the first defendant requesting for the advance to be made.

The plaintiff also submitted that this was not a suitable case for the exercise of the summary jurisdiction of the court to strike out his claim because even on the first defendant's contention that he was not liable to the plaintiff on an oral guarantee because such a guarantee is unenforceable in Sarawak, such a contention gives rise to a serious question of mixed fact and law which is not suitable for disposal on a summary application. According to the plaintiff the serious question which has arisen is whether the Statute of Frauds 1766 is still applicable in Sarawak in view of the extension, since 1 July 1974, of the Contracts Act 1950 to Sarawak. According to the plaintiff, s. 79 of the Contracts Act expressly states that a guarantee may be either oral or written and so his claim against the first defendant remains fully enforceable and cannot under any circumstances be described as a frivolous or a vexatious or a scandalous claim or one that is brought in abuse of the process of court.

Counsel for the plaintiff then addressed me at length on why s. 4 of the Statute of Frauds is no longer applicable in Sarawak. In short, he relies on s. 3(1)(c) of the Civil Law Act 1956 which states that "Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall, in Sarawak, apply the common law of England and the rules of equity, together with Statutes of general application, as administered or in force in England on 12 December 1949, subject however to sub-s. (3)(ii)". Counsel also referred to s. 5(2) of the same Act which provides for the application of English law in commercial matters in Sarawak ... "unless in any case other provision is or shall be made by any written law ... ."

According to counsel, s. 79 of the Contracts Act is that "other provision" or corresponding written law which is now in force in Sarawak and is the provision of law under which any question relating to a guarantee in Sarawak is to be decided, by reason whereof s. 4 of the Statute of Frauds is no longer applicable in Sarawak. He also drew attention to the fact that certain cases which were relied on by the first defendant and which held that the Statute of Frauds was applicable in Sarawak, such as *Tay Guan Hoe v. Chin Huat Hin Co.* [1987] 2 MLJ 704, *Lee Phek Choo v. Ang Guan Yau & Anor* [1975] 2 MLJ 146 and *Law Tanggie v. Untong Ak. Gantang* [1993] 2 MLJ were either decided before the Contracts Act 1950 was extended to Sarawak on 1 July 1974 or did not consider the operation of s. 79 of the Contracts Act. Counsel also referred to *Chew Siang Jin v. Lau Chee Chung & Ors.* [2001] 1 CLJ 822 which held that the Statute of Frauds had no application in Sarawak.

By way of reply to the submissions of the first defendant, the plaintiff said there are good reasons of policy for holding that a provision of English law must give way where our Parliament has enacted a law to cater for local needs. According to the plaintiff, the Contracts Act 1950 which is the applicable law in Malaysia was extended to Sarawak to harmonize and integrate contract laws including of suretyship in Malaysia, and it would be inconsistent with that intention if the enforceability of guarantees made in Sarawak is to be decided on a different basis to the other states in Malaysia.

The first defendant's case is that the learned Sessions Court Judge was correct to strike out the plaintiff's claim against him because the plaintiff's claim being based on an oral guarantee, it is not maintainable in court by virtue of s. 4 of the Statute of Frauds. According to counsel for the first defendant it is vexatious for the plaintiff to proceed any further with a claim which he has no means of proving in the manner required by the Statute of Frauds. Counsel said it is scandalous and an abuse of the process of court to drag the first defendant through all the stages of a legal proceeding just so that at the end of the day the court can say that the plaintiff's claim is not maintainable. Counsel for the first defendant accordingly submitted that if a claim cannot be maintained in court or is one which has no chance of success, then it should be struck out on the grounds that it is frivolous, vexatious, scandalous and or an abuse of the process of the court.

Counsel for the first defendant then took me through a detailed and lengthy examination of the law and the statutory provisions found in s. 4 of the Statute of Frauds, the Law Reform (Enforcement of Contracts) Act 1954 (United Kingdom), ss. 3(1)(c), 3(3)(ii) and 3(3) of the Civil Law Act 1956, ss. 1(2) and 79 of the Contracts Act 1950, and s. 3 of the Interpretation Acts 1948

and 1967, to demonstrate why it must be held that s. 4 of the Statute of Frauds is still applicable to contracts of guarantee made in Sarawak, and why its provisions are not inconsistent with s. 79 of the Contracts Act.

Briefly stated, his contentions were that by s. 3(1)(c) of the Civil Law Act, Statutes of general application in force in England as at 12 December 1949 became applicable in Sarawak. The Statute of Frauds 1766 was one such statute. The Law Reform (Enforcement of Contracts) Act 1954 (United Kingdom) amended the Statute of Frauds so that in England, it remains applicable only to oral guarantees. By s. 3(3)(ii) of the Civil Law Act the importation of specific Imperial Statutes was preserved and if the 2nd Schedule of the Civil Law Act is referred to, the whole of the Law Reform (Enforcement of Contracts) Act 1954 is made applicable to Sarawak without modification. Therefore according to counsel, s. 4 of the Statute of Frauds remains application in Sarawak today. As far as the Contracts Act 1950 is concerned, it was counsel's submission that there is no inconsistency between s. 4 of the Statute of Fraud and s. 79 of the Contracts Act because whilst s. 79 deals with the substantive law on guarantees, s. 4, Statute of Frauds is a procedural or evidential provision which prohibits an action from being brought on an oral guarantee unless it is evidenced by a sufficient memorandum in writing.

With reference to the argument of the plaintiff to the effect that since the Contracts Act 1950 has been extended to Sarawak since 1 July 1974 and it contains provisions dealing with guarantees and so the Statute of Frauds will no longer be applicable in Sarawak because s. 3(1)(c) of the Civil Law Act states that the statutes of general application in England will only apply where no other provision has been made by any written law in force in Malaysia, counsel for the first defendant submitted that the plaintiffs contention cannot be correct in view of the fact that s. 3(1)(c) itself ends with the words "subject however to sub-s. (3)(ii)". When s. 3(3)(ii) is looked at, it will be seen that the Law Reform (Enforcement of Contracts) Act 1954 applies in Sarawak without the limitations stated in s. 3(1)(c) including the proviso thereto. According to counsel, if that be the case, when one applies to Sarawak what, in England, is left of the Statute of Frauds, one is not concerned if there are any other provisions in Malaysia dealing with the matters remaining in the Statute of Frauds unless the other provisions in Malaysia specifically nullifies the Statute of Frauds or at least the matters dealt with in what remains of the Statute of Fraud. According to counsel, further confirmation of this position is found in the commencing words of s. 3(3) of the Civil Law Act which say:

> Without prejudice to the generality of sub-section 1(b) and (c) and notwithstanding subsection 1(c).

Before considering the submissions of counsel, it is convenient to first state something of the law governing an application to strike out a pleading on the grounds relied on by the first defendant. In *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1993] 4 CLJ 7, the Supreme Court held that the principles upon which the court acts in exercising its powers under any of the limbs of O. 18 r. 19(1) Rules of the High Court, (which is the equivalent to O. 14 r. 21(1) Subordinate Courts Rules), is that the court will only strike out a claim in plain and obvious cases and where the claim is obviously unsustainable on the face of it. The court also said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. It is also well settled that when a party applies to strike out his opponent's pleadings under O. 18 r. 19 on a ground other than ground 1(a) of the rule, (which is the case here), the court, in deciding the application, is not confined to only looking at the pleadings but also the affidavits and documents that have been filed by the parties.

With regard to the expansions "frivolous", "vexatious", "scandalous" and "an abuse of the process of the court", useful reference may be made to the *Malaysian High Court Practice*, 2001 Desk Edition where at pp. 612 and 613 a commentary is found on them:

[18.19.4] Scandalous

This is taken to mean wholly unnecessary and irrelevant, not just unpleasant allegation. Therefore, "the sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed: per Lord Selborne LC in *Christie v. Christie* [1873] LR 8 Ch App 499 at 503.

[18.19.5] Frivolous or vexatious

A pleading or part thereof will be struck out on this ground where it is shown to be obviously frivolous or vexatious or obviously unsustainable: *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Company* [1892] 3 Ch 274 at 277.

[18.19.7] Abuse of the process of the court

The court possesses an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin bin Raja Haji Takchik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ16, SC; the use of the court process must be *bona fide.*

So, can the plaintiff's claim of being given an oral guarantee by the first defendant, be said to be wholly unnecessary and irrelevant to his claim of having advanced RM50,000 to the second defendant on the strength of such a guarantee? Or can his claim of having lent money to the second defendant on the strength of the first defendant's oral guarantee be said to be so obviously frivolous or vexatious or so obviously unsustainable? Or that his claim against the first defendant to recover the money lent is not a *bona fide* use of the court process? In my judgment, I do not think that any of the questions posed can be answered in the affirmative and I say so for the following reasons.

The plaintiff's claim is based on a oral guarantee allegedly given by the first defendant. In an affidavit affirmed on 5 February 2001 and filed in these proceedings, the plaintiff has set out the circumstances in which the first defendant is alleged to have given him the oral guarantee, how the sum of RM50,000 came to be advanced to the second defendant, and how the two documents 'TKS1' and 'TKS2' came to be made. The first defendant has in his affidavit affirmed on 12 January 2001 denied giving the oral guarantee, and has given his own version of why the money was paid to the second defendant. In the light of the above disputed facts, it is relevant to note that the first defendant's first line of defence is that no such oral guarantee was given as alleged, but that if there was one then his second line of defence is that it was not enforceable by virtue of s. 4 of the Statute of Frauds. It must also not be overlooked that the two documents produced by the plaintiff and in particular the letter 'TKS1' indicate at the very least that there was some discussion between the plaintiff and the first defendant regarding the RM50,000 advanced to the second defendant. So, on the state of the pleadings and what was said in the affidavits and documents before the court, it is not difficult to see that a serious dispute of fact has arisen on whether an oral guarantee was given at all, and in the light of the affidavit and documentary evidence I do not think that the plaintiff's claim, of having been given an oral guarantee by the first defendant, can be described as a frivolous or vexatious or scandalous claim or one made in abuse of the process of court. In my judgment, the seriously disputed question which has arisen between the parties on this point can only be decided at a trial and not on the basis of disputed facts stated in the affidavits on the hearing of a summary application.

However, what has happened here is that although the first defendant flatly denies ever giving an oral guarantee to the plaintiff in respect of the sum advanced to the second defendant, he proceeded to apply to strike out the plaintiff's claim when the only credible basis upon which his application to strike out could be made was on the premise that there was such an oral guarantee in the first place, otherwise the question of its enforceability by virtue

of s. 4 of the Statue of Frauds would not even arise. But there is nothing in the Record of Appeal to indicate that the first defendant had admitted that he had indeed given a oral guarantee to the plaintiff.

In my judgment this point is not unimportant because it was inappropriate for the learned Session Court Judge to have proceeded to hear the first defendant's application without first reaching a decision on whether or not an oral guarantee had been given, as several consequences flow from the decision reached on the first line of defence. If a trial had been held to determine the first line of defence and after hearing the evidence the court comes to a finding that no oral guarantee was given, that puts an end to the plaintiff's claim. However, if the court were to find that an oral guarantee was given, then it must go on to consider (a) whether the Statute of Frauds is still applicable in Sarawak and, if so, then (b) whether the plaintiff has produced a sufficient memorandum in writing of the oral guarantee on which he sues. And in the event it becomes necessary for the court to consider the question in (b), then it is here that the evidence (both oral and documentary), which it had earlier acted on in arriving at its initial finding regarding the existence of an oral guarantee, will have an impact on how the court views the two documents 'TKS1' and 'TKS2' and whether they constitute a sufficient memorandum in writing of the oral guarantee within the meaning of the Statute of Frauds. Unfortunately in this case, the first defendant committed the learned Session Court Judge to a course which led to her deciding the question in (b) ie, that there was no sufficient memorandum in writing of the oral guarantee. It was inappropriate to do so because that decision necessarily involved the court in arriving at a finding of fact without the benefit of hearing evidence on the point. It was also inappropriate because the court had arrived at a finding of fact without the plaintiff having had the opportunity of presenting his evidence including evidence elicited through cross-examination relating to the circumstances in which the oral guarantee was given and the two documents 'TKS1' and 'TKS2' made.

The plaintiff did not do so and the court did not have the benefit of hearing evidence on the point because no trial was held to decide on the primary question of whether or not there was an oral guarantee. Of course, the first defendant has submitted that as the plaintiff did not plead that there was a sufficient memorandum in writing of the oral guarantee, that question does not arise for consideration. I regret I do not agree with this contention. The disputed question of whether the first defendant had given an oral guarantee or not could only be decided at a trial. At the trial all matters in dispute between the parties would be adjudicated. One of the matters on which there has already been a joinder of issue between the parties is the applicability of the Statute of Frauds. Since what is left of s. 4 of the Statute of Frauds prohibits the bringing of an action unless there is a sufficient memorandum in writing of the agreement being

sued upon, the joinder of issue between the parties would have covered the point and the plaintiff would have been entitled to lead evidence on it at the trial. If not, in order to put before the court for adjudication all matters in controversy between the parties, it would be open to the plaintiff to have resort to O. 15(1) Subordinate Courts Rules under which the court may grant leave to amend a summons and or pleading at any stage of the proceedings whether before or during trial or even after judgment or on appeal, to plead that the two documents he has produced fulfill that purpose.

Quite apart from what I have just said, even taking the approach which the learned Session Court Judge did, can it be said that because of s. 4 of the Statute of Frauds the plaintiff's claim is not maintainable and so it would be clearly vexatious and an abuse of the process of the court to allow the plaintiff to proceed further with it? Again, I do not think so because the issue of whether an oral guarantee is enforceable in Sarawak gives rise to a serious question. The court will have to decide as a matter of law whether s. 4 of the Statute of Frauds is still applicable in Sarawak or whether the law on guarantees is now governed by the provisions of the Contracts Act 1950, which has since 1 June 1974 been extended to Sarawak. To resolve this issue the court will have to undertake a mature consideration of the various statutory provisions which the parties have referred to and which I have indicated earlier in this judgment. I do not think that it is suitable to decide this difficult question of law on a summary application.

In the result I do not think the learned Session Court Judge adopted the correct approach in deciding the first defendant's application. For the reasons I have given I do not think that it can be said nor is it suitable to decide at this stage that the plaintiff's claim is not maintainable. Sufficient facts and matters have been brought out by the plaintiff in his pleadings and on the affidavits which show that there are serious issues of fact and law that require to be investigated and decided at a trial. It certainly cannot be said that what the plaintiff alleges regarding the oral guarantee allegedly given by the first defendant is so obviously unsustainable or not maintainable and hence frivolous, vexatious and brought in abuse of the process of the court.

Before concluding I wish to say that although the parties, during the hearing of the appeal, had agreed that I could decide on the point of law which the learned Sessions Court Judge had dealt with, for the reasons I have already given, it would be wrong to do so and so I have not.

I allow the appeal with costs. I set aside the decision of the learned Sessions Court Judge and remit the matter back to the Sessions Court for trial before another judge.